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No. 92-1820

In The

Supreme Court of the United States

October Term, 1993

JACK J. GRYNBERG,

Petitioner,

vs.

CITY OF NORTHGLENN, COLORADO,

Respondent.

Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PARTIES TO THE PROCEEDING BEFORE THE SUPREME COURT, STATE OF COLORADO iv

ARGUMENT 2

I. THE DECISION OF THE COLORADO SUPREME COURT WAS BASED UPON ITS INTERPRETATION OF THE UNITED STATES AND COLORADO CONSTITUTIONS 2

II. NORTHGLENN'S DESCRIPTION OF THE "UNDISPUTED FACTS" IS COMPLETELY AT ODDS WITH THE RECORD BEFORE THE COURT 6

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Air Pollution Variance Board v.
Western Alfalfa Corp.,
191 Colo. 455, 553 P.2d 811 (1976) 5

Board of County Comm'rs v. Flickinger,
687 P.2d 975, (Colo. 1984) 4

City & County of Denver v. Eggert,
647 P.2d 216, 222 (Colo. 1988) 4

City of Northglenn v. Grynberg,
846 P.2d 175 (Colo. 1993) . . . . . passim

Grynberg v. City of Northglenn,
829 P.2d 473 (Colo. App. 1991) 6

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470, 107 S. Ct. 1232,
94 L. Ed.2d 472 (1987) 3

Kirk v. Denver Publishing Company,
818 P.2d 262, (Colo. 1991) 5

Lucas v. South Carolina Costal Council,
___ U.S. ___, 112 S.Ct. 2886,
120 L.Ed.2d 798 (1992) 2, 3

Nollan v. California Coastal Comm'n,
483 U.S. 825, 107 S. Ct. 3141,
97 L. Ed.2d 677 (1987) 3

Pennsylvania Coal Company v. Mahon,
393 U.S. 415 (1922) 2, 3

Ruckelshaus v. Monsanto Co.,
467 U.S. 986, 104 S.Ct. 2862,
81 L.Ed.2d 815 (1984) 3, 4

Sellon v. City of Manitou Springs,
745 P.2d 229, (Colo. 1987) 5

VanSickle v. Boyes,
797 P.2d 1267 (Colo. 1990) 5

Constitution:

United States Constitution
Amendment V . . . . . passim

United States Constitution
Amendment XIV . . . . . passim

Colorado Constitution,
Article II Section 15 5

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Jack J. Grynberg ("Grynberg") submits this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

ARGUMENT

I. THE DECISION OF THE COLORADO SUPREME COURT WAS BASED UPON ITS INTERPRETATION OF THE UNITED STATES AND COLORADO CONSTITUTIONS.

Northglenn argues that this Court should not grant Grynberg's Petition for Writ of Certiorari should be denied because Northglenn claims that the decision of the Colorado Supreme Court was based exclusively on "matters of state law." This superficial reading of the Colorado Supreme Court's decision in City of Northglenn, Colorado v. Grynberg, 846 P.2d 175 (Colo. 1993) ("Grynberg II") is belied by the opinion of the Colorado Supreme Court, id., and advances a proposition that is flatly at odds with that court's reliance on the United States Constitution and federal law to guide its decisions on inverse condemnation and eminent domain.

It would likely surprise the Colorado Supreme Court to learn that its decision was based solely on "matters of state law". If, as Northglenn claims, the decision of the Colorado Supreme Court has no basis in federal constitutional law, it would be logical that only Colorado case law would be cited to support the decision. To the contrary, however, the ruling in Grynberg II is grounded in decisions of this Court and in the Fifth and Fourteenth Amendments to the United States Constitution.

It is indeed telling that the first and primary authority cited by the Colorado Supreme Court to define when a "taking" occurs under Colorado law was the recent decision of this Court in Lucas v. South Carolina Costal Council, ___ U.S. ___, ___ 112 S. Ct. 2886, 2895 (1992): "[W]hen an owner is called upon to sacrifice all economically beneficial uses of real property to the common good, the owner has suffered a taking." Grynberg II, 846 P.2d at 178. Likewise, in analyzing "the scope of

constitutionally compensable damagings of property", the Colorado Supreme Court listed not a single Colorado precedent; but cited no fewer than three rulings of this Court. Grynberg II, 846 P.2d at 180, n. 5, citing Lucas v. South Carolina Coastal Council, supra; Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 107 S. Ct. 3141, 3147 97 L. Ed.2d 677 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495, 107 S. Ct. 1232, 1247, 94 L. Ed.2d 472 (1987).

Besides defining a "taking" by reference to this Court's interpretation of the United States Constitution, the Colorado Supreme Court relied upon yet another decision of this Court when it addressed Grynberg's contention that Northglenn had taken his property by the acquisition of the surface estate for its wastewater reservoir. Grynberg II, 846 P.2d at 180, n. 6, citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). According to the Colorado Supreme Court, Pennsylvania Coal Co. is persuasive precedent contrary to Grynberg's position. Although Grynberg disagrees with the court's analysis and has explained in his Petition that the Colorado court's misinterpretation of Pennsylvania Coal Co. is but one of a number of instances where it failed to follow the rulings of this Court, it is nonetheless important that the Colorado Supreme Court rested its ruling on federal law, rather than on Colorado law. Petition at 15, 16, 19-20.

And, finally, when the Colorado Supreme Court decided that the unauthorized drilling on Grynberg's property and Northglenn's publication of confidential information did not infringe upon Grynberg's constitutionally protected property rights to trade secrets and proprietary data, the Colorado Supreme Court based its holding upon yet another decision of this Court and upon no Colorado authorities. Grynberg II, 846 P.2d at 182-83, citing Ruckelshaus v. Monsanto, 467 U.S. 986, 1001-04, 104 S. Ct. 2862, 2872-74, 81 L. Ed.2d 815 (1984). Although, the Colorado Supreme Court recognized that "trade

secrets [in Colorado] are property entitled to protection under the Fifth Amendment's Takings Clause," it held that Grynberg had failed to satisfy the elements needed to establish a claim under Ruckelshaus. Id. Thus, on the key subject of when a "taking" occurs and whether, under the facts of this case, Grynberg's property had been taken without just compensation, the Colorado Supreme Court relied upon federal cases and their interpretation of the United States Constitution at every turn.

The Colorado court's reliance upon federal law to decide Grynberg's constitutional claims was normal and customary. The Colorado Supreme Court has long recognized that the Takings Clause of the Colorado Constitution provides, at a minimum, the same due process guarantees that are afforded by the United States Constitution. Thus, the Colorado Supreme Court has consistently held that any consideration of just compensation is necessarily premised upon an analysis of both the Colorado Constitution and the United States Constitution. This fact is established by reference to a sampling of decisions from the Colorado Supreme Court, for example:

1. City & County of Denver v. Eggert, 647 P.2d 216, 222 (Colo. 1988) - "[T]he due process clause of the Colorado Constitution, Art. II, Sec. 25, 'requires at a minimum the same guaranties as those protected by the due process clause of the Federal Constitution under the fourteenth amendment.'"

2. Board of County Comm'rs v. Flickinger, 687 P.2d 975, 983 (Colo. 1984) - "In resolving the [defendants' due process] claim, we take guidance from the United States Supreme Court in construing the Fifth Amendment against governmental taking of private property without just compensation."

3. Kirk v. Denver Publishing Company, 818 P.2d 262, 267 (Colo. 1991) - "The Takings Clause of both the federal and state constitutions is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"

4. Air Pollution Variance Board v. Western Alfalfa Corp., 191 Colo. 453, 553 P.2d 811, 816 (1976) - The United States Constitution provides the minimum protection which must be observed when applying the laws of the State of Colorado.

See also, Sellon v. City of Manitou Springs, 745 P.2d 229, 232, n. 4 (Colo. 1987) (Fourteenth Amendment of the United States Constitution and Art. II, Sec. 25 of the Colorado Constitution provide the same due process protections); VanSickle v. Boyes, 797 P.2d 1267, 1271-72 (Colo. 1990) (analysis of taking made in light of Fifth Amendment of the United States Constitution and Art. II, Sec. 15 of the Colorado Constitution).

What resounds from a reading of the Colorado Supreme Court's holding in Grynberg II, and from an analysis of its prior decisions on due process and just compensation, is that these issues cannot be and are not analyzed without reference to the United States Constitution. Given the Colorado Supreme Court's repeated pronouncement that it is guided by the Fifth and Fourteenth Amendments of the United States Constitution, and with the ample evidence that in Grynberg II the Colorado Supreme Court was guided by decisions of this Court which interpret the United States Constitution, Northglenn's contention that the Grynberg II decision was based solely upon "matters of state law" rings hollow. And, although it may have cited federal law in support of its decision, the Colorado Supreme Court has taken license with the rulings of this Court to reach a tortured

and incorrect result. By granting Grynberg's Petition for Writ of Certiorari, the Court can set the record straight.

II. NORTHGLENN'S DESCRIPTION OF THE "UNDISPUTED FACTS" IS COMPLETELY AT ODDS WITH THE RECORD BEFORE THE COURT.

In order to bolster its contention that Grynberg suffered no damage as a result of Northglenn's conduct, Northglenn (and, ultimately the Colorado Supreme Court) create "facts" and call them "undisputed". Brief in Opposition at pp. 15-18. Although Northglenn contends that there was no physical occupation of Grynberg's land, the opposite conclusion was reached by the trial court and by the appellate court which actually studied the record of the trial, where it was determined that Northglenn had physically occupied Grynberg's property by conducting unauthorized drilling and exploration activities on it. See Grynberg v. City of Northglenn, 829 P.2d 473, 476 (Colo. App. 1991). Moreover, Northglenn's contention that "there has never been a determination that Northglenn somehow deprived Grynberg of all economically beneficial use of his coal lease" pales in the light of the evidence. At trial, Grynberg's witnesses "opined that plaintiff's mineral rights under the coal lease would no longer yield a willing buyer", and the jury returned a verdict of $646,930 based upon the complete loss of value for Grynberg's property rights. Id. Not only did the Colorado Supreme Court misapply federal law, it shaded the facts to justify a result which denies Grynberg just compensation for the taking of his property rights.

CONCLUSION

Grynberg was denied due process as a result of a ruling that misstates the facts in the case and misapplies applicable constitutional law. Grynberg respectfully requests that his Petition be granted to remedy this wrong.

Respectfully submitted,

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